IN THE HIGH COURT OF SOUTH AFRICA

(CAPE OF GOOD HOPE PROVINCIAL DIVISION)

CASE NO: 395/04

In the matter between:

THE CITY OF CAPE TOWN **Applicant**

And

STACEY YAWA AND OTHERS **First to Eighteenth Respondents**

THE OTHER OCCUPIERS UNKNOWN TO APPLICANT WHO UNLAWFULLY OCCUPY ERF 18332, KHAYELITSHA, IN THE CITY OF CAPE TOWN, WESTERN CAPE **Nineteenth Respondent**

THE PERSONS INTENDING TO UNLAWFULLY OCCUPY ERF [1……], KHAYELITSHA, IN THE CITY OF CAPE TOWN, WESTERN CAPE **Twentieth Respondent**

JUDGMENT DELIVERED ON 29 JANUARY 2004

BUDLENDER AJ:

In this case the applicant seeks an order for the eviction of the first to eighteenth respondents, who are identified by name, and who are alleged to be unlawfully occupying erf [1……], Khayelitsha, Cape Town. The applicant seeks similar relief against the nineteenth respondent, described as "The other occupiers unknown to applicant who unlawfully occupy erf [1……..], Khayelitsha". The applicant brings these proceedings, as it is obliged to do, under the provisions of the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act No. 19 of 1998 (the Act).

In addition, the applicant seeks an interdict restraining the twentieth respondent, described as "The Persons Intending to Unlawfully Occupy Erf [1…….], Khayelitsha" from erecting and/or occupying any structure or makeshift dwelling for the purpose of unlawfully occupying or residing on the erf.

The application originally came before **Dlodlo AJ**. He made an order directing how notice under section 4 (2) of the Act was to be given to the first to nineteenth respondents, and for certain related relief. In relation to the application against the twentieth respondent, for reasons which are not relevant here, he referred this matter to me.

It is therefore not necessary for me to consider the relief which the applicant seeks against the first to nineteenth respondents. The only aspect before me is the application against the twentieth respondent.

The twentieth respondent is a group of unidentified people. The applicant does not know and cannot say who they are or where they are.

In ***Kayamandi Town Committee v Mkhwaso and others*** **1991 (2) SA 630 (C**), the applicant sought an eviction order against nine named respondents and other unnamed respondents, consisting altogether of some 150 people, who were allegedly unlawfully occupying a piece of land. **Conradie J** (as he then was) held that one of the essential tests for determining whether a particular act is to be classed as a judicial act is whether there is a *lis inter partes* (at 634 B). He said that "a failure to identify defendants or respondents would seem to be destructive of the notion that a Court's order operates only *inter partes* …. An order against respondents not identified by name (or perhaps by individualised description) in the process commencing action or (in very urgent cases, brought orally) on the record would have the generalised effect typical of legislation. It would be a decree and not a Court order at all" (at 634 F-I).

That approach was endorsed by **Ngwenya J** (Hlophe JP concurring) in ***Illegal Occupiers of Various Erven Philippi v Monwood Investment Trust Company (Pty) Ltd*** **(2002) 1 All SA 115 (C). Ngwenya J** also stated at 121h that "The parties in legal proceedings must be clearly identified. There are serious difficulties when the applicant, as is the case here, does not have the requisite details of the respondents. The respondents did not and do not have the particulars of the appellants. Regrettably, our rules of procedure here do not assist us at all as to what to do when faced with this dilemma. Therefore, each case will have to be considered on its own merits."

Mr Arendse for the applicant referred me to ***Communicare v The Persons Whose Identities are Unknown to the Applicant but who unlawfully occupy the remainder of***

the consolidated farm Bardale no. 451, Division of Stellenbosch *better known as* ***Fairdale and others*** **(CPD case no. 7970/03,** unreported). In that matter **Rogers AJ** stated (at paragraph 9): "I do not believe that these cases should be regarded as laying down an immutable rule that an application directed at unnamed respondents is always permissible. It seems to me that our procedural law would be sadly lacking if that were the case. What is an owner to do where his land is illegally occupied by persons whose identities he cannot ascertain?" **Rogers AJ** pointed out that in the *Kayamandi* case, **Conradie J** had held that the Prevention of Illegal Squatting Act 52 of 1951 provided an adequate alternative remedy. That Act has (thankfully) been repealed, and that remedy is therefore no longer available. He concluded that "the persons in occupation of land can be viewed as an ascertainable group, even though their names might not be known. Through the process of service more information concerning the identities of the group may become known. In the ordinary course no relief would be granted against unlawful occupiers under s 4 of PIE (the Act) until notice has been given by a method approved by the court. When the eviction proceedings ultimately serve before the court, it will be necessary to assess the adequacy of the notice and whether an effective order against sufficiently identified parties can be granted. Each case must depend on its own facts."

Rogers AJ proceeded to examine the facts in relation to each of the respondents who had not been named or identified in the founding papers, and made orders in respect only of those who had subsequently been sufficiently identified by reference to their names or where they lived.

It seems to me that this approach is consistent of that of **Ngwenya J** in the ***Monwood*** case, where he held that “each case will have to be considered on its merits”.

I therefore accept that the fact that the individuals comprising the twentieth respondent have not been identified is not of itself an absolute bar to these proceedings.

However, it seems to me that there is a much more fundamental problem with this aspect of the application. The persons who comprise or might comprise the twentieth respondent, namely persons *intending* to unlawfully to occupy the erf, are not in any real sense an ascertainable group. In this instance there is not an “identified or identifiable group of persons who are properly before the court and against whom an effective order can be made” (***Monwood* at para 15**). There is no prospect that they will be identified during the course of the proceedings, as happened in the ***Communicare*** case. The identity of the members of the twentieth respondent will change from day to day. Some of those currently intending to occupy the land may decide not to do so. Some people, who today have no intention to occupy the land, may subsequently decide to do so.

The problem is demonstrated by the form of service which is proposed in the respect of the twentieth respondent. The applicant asks for an order that the Sheriff erect notice boards at such points along the boundaries of the erf as he deems effective, and that he affix a copy of the application and the interim order to those notice boards. Secondly, the applicant seeks an order that the Sheriff read out the contents of the interim order at such places on the erf and along the boundaries of the erf as he deems will be effective.

The second means of service can be disposed of very quickly. If the Sheriff reads out the order today, it will be of no purpose or effect in respect of any person who is not present when he reads out the order, and who intends to occupy the land tomorrow or thereafter. It will be effective only in respect of any people who at the moment of announcement happen to be in the process of occupying the land, or visiting it. It will not give any notice of the order to any other people intending to occupy the land, and will be entirely ineffective as far as they are concerned. The first method of service will be of very dubious efficacy. The documents on the notice board will have to remain there indefinitely if they are to have any effect at all. One can readily imagine that the documents are not likely to remain on those notice boards for very long. Some will be removed, and some will be blown off by the wind or the rain.

The difficulties with service illustrate the fundamental problem with the order which is sought. It is already unlawful for persons to occupy the erf in question without the consent of owner. It is a criminal offence in terms of the Trespass Act No 6 of 1959. What the applicant is in substance seeking, is an order on the world at large to obey the law in respect of its property. To use the formulation of **Conradie J** in the ***Kayamandi*** case, that is a legislative and not an administrative act. It is a decree and not a court order at all.

I have not been able to find, and counsel could not refer me to, any judgment in which our courts have made and explained the basis for a general order of this kind, enjoining the public at large to obey the law. Mr Arendse referred me to certain unopposed applications in this division, in which orders of this kind had been made. None of them was opposed, and in none of them were reasons given for the order. There is therefore no basis for

finding that this question was ever raised before or by the court, or considered by the court before making its order. Those orders are therefore not of much assistance.

Much more relevant is the judgment of **Rogers AJ** in the ***Communicare*** case, where a similar order had been sought. **Rogers AJ** concluded that this mode of seeking relief against an unidentified group of persons, namely anybody who may in the future enter upon the property for the purpose of unlawfully occupying it, falls foul of the principles formulated in the ***Kayamandi*** and ***Monwood*** cases. He found that an order of this sort would simply be a decree to all and sundry forbidding them to take up occupation of the land, and that the granting of such relief simply does not represent a judicial function. I respectfully agree. **Rogers AJ** pointed out that if somebody were later, after service of the order, to enter upon the land, it is difficult to see how proceedings for contempt could ever be brought against such a person: "It would be impossible to point to a court order binding that particular person." Again, I respectfully agree.

I put this problem to Mr Arendse, and asked him under those circumstances, what the purpose of the order was. If it was already a criminal offence for anyone unlawfully to occupy the land, then what would be gained by also making it contempt of court to do so? He answered by pointing to a passage in the founding affidavit, where the deponent on behalf of the applicant stated "the Applicant does not have the manpower nor is it sufficiently equipped to prevent the unlawful invasion of the erf by a large of people. It has to rely on the South African Police Services who are hesitant to become involved in the absence of an appropriate court order authorizing them to do so. Once such an order has

been granted, it will enable the Applicant, duly assisted by the South African Police Services to prevent any further invasion of the erf."

The South African Police Services are not a party to these proceedings. It is however self-evident that the police services are under a constitutional and statutory duty to enforce the law: see section 205(3) of the Constitution and section 13 of the South African Police Service Act No 68 of 1995. They do not require an order of court authorizing them to do so, and neither are they entitled to require an order of court before they do so. I recognize of course that there are resource constraints upon the police, and that they have to determine priorities as they carry out their duties. They cannot be everywhere all the time. However, an order of this court granting an interdict against unnamed persons does not assist the police in any way, and is not an appropriate method for determining those priorities.

If the South African Police Services fail to carry out their constitutional and statutory duties, the Applicant's remedy is to seek an order against them, rather than to seek an ineffectual order against the world at large to obey the law in respect of its property.

Finally, I should add that the order sought is in any event tautologous. The twentieth respondent is defined as those people intending to occupy the land *unlawfully*. By definition it is unlawful for them to occupy the land. The very name of the respondents begs and answers the question whether they may occupy the land. I do not see the purpose in asking a court to declare that people who by definition are described as acting unlawfully, may not act unlawfully. If they are not acting unlawfully, then they do not fall

within the range of the respondents at all. They do not even have to oppose the application. If they are acting unlawfully then that is the end of the matter.

Not surprisingly, given that this application was brought *ex parte* and given the nature of the relief sought, no one appeared on behalf of the twentieth respondent to oppose the application. There is therefore no need for an order for costs in that respect.

The application for an interdict in respect of the twentieth respondent, as set out in Part A of the Notice of Motion, is accordingly dismissed.

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G M BUDLENDER